CIRCUIT COURT OF OREGON
THIRD JUDICIAL DISTRICT
MARION COUNTY COURTHOUSE
P.O. BOX 12869
SALEM, OREGON 97309-0869

JOSEPH C. GUIMOND, JUDGE
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STATE OF OREGON
Marion County Circuit Courts
AUG 23 2011
ENTERED

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August 23, 2011

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RE: Oswald v. McNary
Case 09C16895

Dear Mr. Hill and Mr. Meneghello:

This matter comes before the court following a stipulated facts bench trial on July 13, 2011.

Plaintiff owns a home in the McNary Estates community which is located along a golf course in Keizer, Oregon. Defendants are the McNary Estates Homeowners Association and individual members of its Board of Directors (collectively Defendants). Part of Defendants' responsibilities includes enforcement of the McNary Estates Architectural Design Review Manual (ADRM). Article 3.7(b) of the 2003 ADRM provides:

> Golf Course Lots: *All Fences and Wall shall comply with the requirement of Non-Golf Course Lots with the following exceptions,*
>
> 1. All rear yard fences constructed nearer than ten (10) feet to a golf course shall not exceed three (3) feet in height. Acceptable fencing materials include ornamental iron, aluminum and chain link. Other materials such as wood or vinyl will not be permitted.

Om 2006, the Board adopted a revised ADRM, which was substantially similar to the prior version:

> 3.09(f) Perimeter Railings and Screens. On lots adjacent to the golf course, all perimeter railings shall not exceed three (3) feet in height, shall be constructed only of wood or ornamental iron, and shall not create a solid barrier between the patio and golf course. No solid perimeter screens of any height shall be permitted except

> when needed to comply with the requirements of Section 3.13 for hot tubs.

In 2003, Plaintiff sought Defendants' permission to install fabric privacy screens around his back patio. Plaintiff stated that he wanted to install the screens in order to have more home privacy from the golfers on the golf course. Defendants rejected Plaintiff's request as the screens did not comport with ADRM. In 2004, Plaintiff again requested to install four-foot high fabric privacy screens. Defendants denied his request for the same reasons.

Despite Defendants' denial of the installation, in 2005, Plaintiff ordered custom-made "privacy panels" that were four to six feet high. Without Defendants' authorization, Plaintiff installed the panels around his back patio. The fabric panels can be hung by snapping them into the patio posts and snapping the screen onto the fasteners. The panels are just as easily removed.

When Defendants learned of this violation, it informed Plaintiff that the panels violated the ADRM and instructed him to remove them. Defendants held a hearing on the issue on September 25, 2005. Defendants affirmed its prior decisions. Defendants sent a written confirmation that explained alternative types of enclosures that Plaintiff could consider that would be in compliance with the ADRM.

In September 2008, Defendants learned that Plaintiff again re-installed his privacy panels without Defendant's permission. This act led to a fine, which Plaintiff appealed to a hearing. As a part of this process, Plaintiff, for the first time, stated that he wished to install the privacy panels to restrict the movements of his girlfriend's son. The son suffers from Down's syndrome and attention deficit disorder. Plaintiff's girlfriend and son sometimes stay with Plaintiff at his house. Plaintiff claimed that the privacy panels were to prevent the son from wandering away and bothering neighbors and golfers on the occasion that the son was unsupervised.

In April 2009, Defendants determined that the privacy panels continued to violate the ADRM. However, Defendants stated that they were willing to discuss other alternatives that would not violate the ADRM.. Plaintiff responded that he did not believe that Defendants were making an accommodation by reiterating the ADRM standards and only considering alternatives that would not violation such standards. Plaintiff asked Defendants whether further discussions about the panels would be fruitful. Defendants did not respond to the inquiry regarding the need for additional discussions.

On June 26, 2009, Plaintiff filed his Complaint, alleging that Defendants failed to accommodate the son's handicap under the Fair Housing Act, 42 U.S.C. §3601 (FHA).

Pursuant to the FHA, it is unlawful

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of:
>
> (A) that person; or

> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
>
> (C) any person associated with that person.

42 U.S.C. §3604(f)(2).

The statute defines "discrimination" to include:

> [A] refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; * * *

42 U.S.C. §3604(f)(3)(B);

To establish a claim of discrimination on a theory of a failure to reasonably accommodate, a plaintiff must demonstrate that

> (1) he suffers from a handicap as defined by the FHA; (2) defendants knew or reasonably should have know of the plaintiff's handicap; (3) accommodation of the handicap "may be necessary" to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation.

Giebler v. M&B Assocs., 343 F.3d 1143, 1147 (9th Cir. 2003) (citing *U.S. v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997).

With regard to the above requirements, of sole concern in this case is whether Plaintiff's house can be considered the son's "dwelling" for the purposes of a failure to accommodate claim under the FHA.[1] Under the FHA, a dwelling is defined as:

> [A]ny building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. §3602(b).

Although residence is not defined under the FHA, courts have generally adopted the dictionary definition of residence: a temporary or permanent dwelling place, abode, or

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[1] Defendants have acknowledged that the son suffers from a handicap as defined by the FHA, that Defendants knew of the handicap, and that Defendants have not made an accommodation.

habitation to which one intends to return, as distinguished from the place of temporary sojourn or transient visit. *U.S. v. Hughes Memorial Home*, 396 F. Supp. 544, 529 (W. D. Va. 1975) (citing *Webster's Third New Internat'l Dictionary*); *see also Hernandez v. Ever Fresh Co.*, 923 F. Supp. 1305, 1308 (D. Or. 1996) ("The FHA does not include a definition for the word 'residence.' The United States Court of Appeals for the Ninth Circuit has not defined the word 'residence' for the purposes of the FHA. The case often cited by courts interpreting a 'residence' under the FHA is *U.S. v. Hughes Memorial Home*, 396 F. Supp. 544, 549.").

In distinguishing between a "temporary dwelling place, abode or habitation which one intends to return," and "a place of temporary sojourn or transient visit," courts may consider the occupants length of stay and whether the occupants view the building as a place to which they will return. *U.S. v. Columbus Country Club*, 915 F.2d 877, 881 (3rd Cir. 1990).

The court finds that Plaintiff's home is considered a dwelling for the son. Even though the son and his mother have a permanent residence and the son attends school in Lincoln City, Oregon, the son and mother spend the entire summer at Plaintiff's house, as well as every other weekend. The son has his own room in Plaintiff's house that is filled with the son's personal belongings. The son keeps his clothes and personal belongings at Plaintiff's house when the son and his mother return to Lincoln City.

Regardless of the facts that the son attends school in Lincoln City, has never listed Plaintiff's address as an official or unofficial place of residence or that Plaintiff's girlfriend and son have never received mail at Plaintiff's house, the house cannot be simply viewed as a place of "temporary sojourn or transient visit." Clearly, the mother and son spend substantial time at Plaintiff's house and Plaintiff, his girlfriend, and her son all view the house as a place where the son would return. As such, the court finds that Plaintiff's house constitutes a dwelling for the purposes of the FHA.

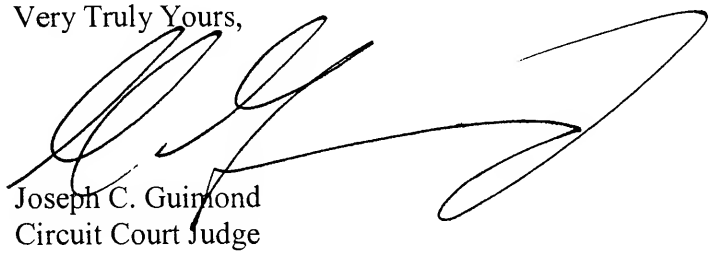
The second issue before the court is whether Plaintiff was required to engage in an "interactive process" under the FHA and if so, whether Plaintiff failed to sufficiently engage in the interactive process such that he is prohibited from recovering under a failure to accommodate theory.

The court finds that the interactive process is not required under the FHA. The FHA's reasonable accommodation requirement was borrowed from the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq*. Under that Act, a defendant employer has "a duty to make reasonable efforts to assist [an employee], to communicate in good faith. *Lapid Laurel LLC v. Zoning Bd. of Adjustment of Scotch Plains*, 284 F.3d 442, 454 (3rd Cir. 2002) (internal citations omitted). However, the FHA and the Rehabilitation Act "do no bear the significant similarities that justified importing the [interactive process. The informal interactive process. . . applies specifically to an employer-employee relationship." Thus, the Third Circuit held that "notwithstanding the 'interactive process' requirement that exists in the law of this court in the employment context under the Rehabilitation Act.. ., the FHA imposes no such requirement on local land use authorities." Accordingly, the court finds that there is no requirement for the parties to engage in any "interactive process" under the provisions of the FHA.

In sum, the court finds that Defendants have failed to make reasonable accommodations of its rules and policies as laid out in the ADRM and Plaintiff is entitled to a Judgment in his favor. Moreover, Plaintiff is entitled to an award of his attorney fees and costs pursuant to Section 813 of the FHA (42 U.S.C. §3613).

Mr. Hill may prepare a Judgment and a request for attorneys fees per this opinion and ORCP 68.

Very Truly Yours,



Joseph C. Guimond
Circuit Court Judge